LAW OFFICE OF

Kristy Grafton Goldberg, LLC

ATTORNEY AT LAW

February 9, 2016

The Honorable Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Tommie Pixley, SCDC #285026 vs. State of South Carolina
Appeal of Case 2015-CP-19-103

Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal so that they may begin representation of Mr. Pixley as I was appointed in this matter. I am also hereby requesting that Appellate Defense obtain a copy of the court transcript within the time required by this court.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,

Kristy Goldberg

CC: Patrick Schmeckpeper
Assistant Attorney General
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The Honorable Charles L. Reel
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2015-CP-19-103

Tommie Leon Pixley, SCDC # 285026. . . . . Appellant

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant Tommie Leon Pixley hereby appeals from the Order of the Honorable D. Craig Brown presiding Judge for the 11th Judicial Circuit, filed February 5, 2016 and received by counsel for the Applicant on February 9, 2016 in the matter of Tommie Leon Pixley v. State of South Carolina, Case No. 2015-CP-19-103.

February 9, 2016

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Attorney for Plaintiff

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THE STATE OF SOUTH CAROLINA
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Tommie Leon Pixley, SCDC # 285026. . . . . Appellant

v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes and states:

She is the counsel of record for Applicant;
Service by mail is proper in this instance; and
She has served the NOTICE OF APPEAL on the following party on February 9, 2016 by depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Patrick Schmeckpeper
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Other Counsel of Record:
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF EDGEFIELD	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Tommie Leon Pixley, S.C.D.C. No. 285026	)	**C.A. No. 2015-CP-19-0103**
Applicant,	)	
v.	)	**ORDER OF DISMISSAL** **(with prejudice)**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on April 1, 2015. Respondent filed its Return on or about December 7, 2015. An evidentiary hearing into the matter was convened on December 9, 2015, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Kristy Goldberg, Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Edgefield County Clerk of Court. In November 2013, the Edgefield County Grand Jury indicted Applicant for distribution of crack cocaine – second offense (2013-GS-19-0591). Andrew Farley, Esq. represented Applicant. On February 9, 2015, Applicant pled guilty as indicted. The Honorable R. Knox McMahon sentenced Applicant to a term of five (5) years imprisonment. Applicant did not appeal his guilty plea or sentence.

Allegations

In his application for post-conviction relief, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. "I was told I was pleading to 4 years";
    a. "my plea turned out to be five years";
2. "The date of the offense I pled guilty to is 5-2-13";
    a. The evidence shows the offense occurred on 4-2-13";
3. The Counsel was ineffective";
    a. I only saw him one time and I went to court 4 days after."

On May 12, 2015, Applicant amended his application through counsel to include the following allegations:

1. Ineffective assistance of trial counsel – Trial counsel misadvised Applicant regarding the terms of the negotiated sentence and how that sentence is calculated within the Department of Corrections;
2. Applicant entered an involuntary guilty plea that was not intelligently made due to his reliance on incorrect advice from trial counsel and pressure from Investigators;
3. Ineffective assistance of trial counsel – trial counsel allowed Applicant to plead guilty to an invalid indictment listing the incorrect offense date;
4. Trial counsel failed to file a Notice of Appeal upon request by the Applicant.

SUMMARY OF TESTIMONY

Applicant testified that counsel was not the first attorney to represent him in this criminal matter. Applicant's earlier attorneys were either relieved or conflicted out, until Andrew Farley, his plea counsel, was appointed. Applicant said that he met with plea counsel a couple of days before the plea. He further stated counsel told him he would get a five (5) year sentence, and only serve sixty-five (65) percent of that time in prison. Applicant said he would not have pled guilty otherwise.

Applicant said that he was taken from jail to court by investigators, who lied to him and said things about his family. He said counsel should not have allowed them[1] to sign Applicant

[1] Applicant seems to be referring to police officers taking him to court from the jail.

out and take him to court. Applicant testified that the indictment says the offense occurred on May 7, but that the warrant said April 7.

Following the guilty plea, Applicant said that he wrote to counsel about his right to appeal. He said he did not ask counsel for a direct appeal the day of his guilty plea because he did not find out that he was required to serve eighty-five (85) percent of his sentence until he got to Kirkland.[2] He said as soon as he got to Kirkland, he wrote to the clerk of court in an attempt to get in touch with his attorney to file an appeal. He said he did not reach out directly to counsel because he did not have his contact information. He said he did not make a phone call because SCDC had not yet issued him a pin number to access the phones. Applicant said that if he knew he was not going to get a sixty-five (65) percent sentence, he would not have signed onto the plea deal.

On cross-examination, Applicant acknowledged that the judge told him the offense he was pleading to carried a range of five (5) to thirty (30) years imprisonment. He also said he understood that the Solicitor said it was a negotiated five (5) year sentence. He said that no one said, in court, that part of his negotiations were that he would only serve sixty-five (65) percent of his sentence. He said he did not tell the judge that these were among his expectations.

Counsel testified that he represented Applicant for a very short period of time. He said that they met once for a number of hours, reviewed discovery, and went over any issues Applicant brought up. Counsel said Applicant was concerned about an issue with the indictment,[3] but counsel believed it was merely a scrivener's error that would have no impact on his case. He also discussed the confidential informant and the potential of proceeding to trial. Counsel said following these discussions, Applicant informed him that he wanted to plead guilty.

[2] Kirkland Correctional Institution.

[3] Applicant has alleged that counsel's failure to raise the indictment issue constitutes ineffective assistance in violation of his Sixth Amendment right to counsel.

Counsel stated he agreed with Applicant's decision, and called the solicitor to ask for a plea deal at Applicant's request.

Concerning sentencing, counsel testified that he explained to Applicant that the negotiations were for five years. He said he did not recall telling Applicant that he would only serve sixty-five percent. Counsel testified that he does not tell clients the exact amount of time or number of days they will be required to serve on any given sentence because such calculations are made by the Department of Corrections. Counsel said he thought Applicant understood everything, and that he did not try to rush the Applicant into a guilty plea. Counsel testified that Applicant did not say anything to him about an appeal at his guilty plea hearing. He stated that by the time he got Applicant's message from the clerk of court, the time period for filing an appeal had passed. Counsel said he would have filed an appeal had Applicant asked him to do so.

On cross-examination, counsel said he did not recall writing Applicant any letters following his guilty plea. He testified that he was "fairly certain" that he left a business card, and that leaving one is his standard practice. However, he could not remember exactly, and cannot say with one hundred percent certainty that he left one.

Counsel stated again that he did not object to the indictment because he believed it was a scrivener's error, and could have been easily corrected. He said that he did not think it was a fatal flaw in the State's case, and that other documents listed the correct date.

Counsel reemphasized that he told Applicant the sentence was five (5) years, and that whether a client would have to serve sixty-five (65) or eighty-five (85) percent is not something he guarantees. Counsel said that he thought the deal was a good offer, and that a trial would

have exposed Applicant to a greater sentence. He further testified that Applicant asked him to schedule a plea hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject guilty pleas, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the post-conviction relief transcript, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must

overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625. Because Applicant pled guilty, he must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Involuntary Guilty Plea

An applicant asserting a constitutional violation must generally frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 363-64, 527 S.E.2d 742, 747 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)). An applicant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citing Hill v. Lockhart, 474 U.S. 52; Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000); Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (1994)). An applicant alleging his or her guilty plea was induced by ineffective assistance of counsel must prove

counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. at 56. Furthermore, "[a] guilty plea is a solemn, judicial admission of the truth of the charges" against the applicant. Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63 (1977)). Admissions "made during a guilty plea should be considered conclusive unless [an applicant] presents valid reasons why he should be allowed to depart from the truth of his statements." Id. at 137-38, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976)).

Sentence Calculation

Applicant alleges that trial counsel was ineffective for misadvising Applicant regarding the terms of the negotiated sentence and how that sentence is calculated within the Department of Corrections. Applicant further alleges that this ineffective assistance rendered his guilty plea involuntary.

This Court finds Applicant has failed to meet his burden with respect to either of these allegations. In light of the thorough colloquy during Applicant's guilty plea, as well as conflicting testimony presented at the evidentiary hearing, Applicant's testimony that counsel told him he would only have to serve sixty-five (65) percent of his sentence is not credible. This Court finds that counsel's testimony to the contrary to be entirely credible. As it is Applicant's burden to prove each allegation, and Applicant has not presented any other evidence in support of his first two allegations, they are necessarily denied and dismissed.

Indictment

Applicant has also failed to meet his burden to show counsel ineffective for failing to object to the indictment.

The indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). An indictment is generally sufficient if (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) it apprises the defendant of the elements of the offense that is intended to be charged. Id. at 102-03, 610 S.E.2d at 500. In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. Id. Further, whether the indictment could be more definite or certain is irrelevant. Id.

This Court agrees with counsel that there was no basis to challenge the sufficiency of the indictment because it was a scrivener's. See State v. Bultron, 318 S.C. 323, 329-30, 457 S.E.2d 616, 620 (Ct. App. 1995) (affirming trial court's decision to deny a motion to quash an indictment based on a mere scrivener's error). A facial irregularity does not render an indictment invalid where the indictment is in writing and published by the clerk. Anderson v. State, 338 S.C. 629, 632-33, 527 S.E.2d 398, 400 (Ct. App. 2000) (*citing* Bultron at 329, 457 S.e.2d at 619). This allegation is therefore denied and dismissed.

Appeal

The Court finds Applicant has failed to meet his burden to prove he did not knowingly and voluntarily waive his right to a direct appeal. Counsel must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). However, a defendant may waive a direct appeal by making a "knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010) (quoting Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)). Furthermore, "[a]cts

inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)).

The Supreme Court of South Carolina has reversed a PCR judge's grant of a belated appeal where the applicant "specifically acknowledged at the PCR hearing that he did not ask the plea counsel to file a direct appeal," and "offered no evidence which reasonably demonstrated an interest in appealing" as required by the second prong of Roe.[4] Jones v. State, 382 S.C. 589, 597, 677 S.E.2d 20, 24 (2009). In Roe, the United States Supreme Court, held that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when the defendant reasonably demonstrated *to counsel* that he was interested in appealing. 528 U.S. 470, 480, 120 S.Ct. 1029, 1036 (emphasis added). Here, Applicant did make any indication *to counsel* that he wished to appeal.

The record is clear that Applicant was informed of his right to appeal by the plea judge, and that he had ten days to exercise that right. Tr. p. 10. Additionally, this Court finds counsel's testimony that Applicant did not ask him to file an appeal to be credible. Even Applicant acknowledged, at the evidentiary hearing, that he never expressed any interest *to counsel* that he wished to file an appeal. Instead, he sent a letter to the clerk of court asking for an appeal, and requesting that they forward the letter to his attorney, the Court of Appeals, and the Supreme Court. This Court finds Applicant's failure to tell his attorney directly that he wished to appeal constituted a valid waiver of that right. See Bonnette, supra. This is particularly true in light of counsel's credible testimony that his general practice is to leave business cards with clients at the end of their representation, and that he believes he left one with Applicant. Taken in this

[4] Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000).

context, Applicant's conflicting testimony is simply not credible. This allegation is therefore denied and dismissed.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

[*Signature follows*]

CONCLUSION

Based on the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1 day of Feb., 2016.

D. CRAIG BROWN
Presiding Judge
Eleventh Judicial Circuit

Florence, South Carolina